BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

In re Applications of	)	MM Docket No. 92-111
Deas Communications, Inc.,	)	
et al.	)	File Nos. BPH-910208MB
	)	et al.
For A Construction Permit	)	
For A New FM Radio Station	)	
on Channel 240A	)	
Healdsburg, California	)	

To: The Commission

OPPOSITION OF HEALDSBURG BROADCASTING, INC. TO APPLICATION FOR REVIEW OR, ALTERNATIVELY MOTION FOR EXTRAORDINARY RELIEF

Healdsburg Broadcasting, Inc. ("HBI"), pursuant to Section 1.301 of the Commission's rules, hereby opposes and requests Commission dismissal of the October 13, 1992 Deas Communications, Inc. ("Deas") "Application For Review Or, Alternatively Motion For Extraordinary Relief" of Deas Communications, Inc., 92R-82 released October 21, 1992.

1. The Deas "Application" Violates Commission Procedures And Should Be Dismissed

The Deas Petition must be dismissed as a procedural matter. Section 1.301(a) of the Commission's rules explicitly allows only a party dismissed with prejudice from a proceeding to request immediate Commission review by interlocutory order. SBM Communications, Inc. 7 FCC Rcd 3436 (1992) at para. 2 (procedurally deficient matters concerning appeals are subject to summary dismissal). Deas' application for review of the Review Board's Order reinstating HBI's application does not lie until the hearing has been completed, an initial decision rendered and exceptions taken to the Review Board. See generally Section 1.115 of the Commission's Rules. Indeed, though the Bureau's position was reversed by the Review Board, it has not challenged the Board's Memorandum Opinion and Order ("Board Order") herein because the Bureau is aware that an application for review does not lie at this procedural juncture.[1]

The Deas "Application" has other procedural infirmities. The Board's Order was not released until October 21, 1992; Deas' pleading was filed October 13, 1992, or over a week prior thereto. Thus, Deas has filed a pleading concerning a matter that does not exist and must be dismissed. See Section 1.301(c)(2) of the Commission's rules; see also William H. Bailey, 56 RR2d 294 (1984). In addition, the Deas "Application"

[1] Nonetheless, because Deas has raised the issue, HBI expects the Bureau to reargue its position to the Commission in Comments on the Deas' "Application For Review."

is six pages long, or one page in excess of the page limit of Rule 1.115(f)(1), under which it has dubiously been filed, a further reason for its dismissal. SBM Communications, supra.

2. The Deas "Application" Is Meritless

The Deas Application's procedural flaws coincide with its substantive lack of merits. As the Board's Order correctly points out, the sanction of drastic dismissal in the middle of a proceeding requires "full and explicit notice of all prerequisites for such consideration" (citation omitted) . . . . "When the sanction is as drastic as dismissal without any consideration of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration." Board Order at para. 20; Malkan FM Associates, 935 F. 2d 1313, 1318-1319 [69 RR 2d 594, 598] (D.C. Cir. 1991); Salzer v. FCC, 778 F.2d 869 [59 RR 2d 639] (D.C. Cir. 1985). See also Center Broadcasting, Inc. v. FCC, 856 F. 2d 1551 (D.C. Cir. 1988); Board Order at fn. 21. Here, as the Board recognized, the Bureau argued to the ALJ, but not to the Board, that HBI's correction of its Section 73.316 (b)(2) computational error was absolutely barred by the Hearing Designation Order ("HDO"). Under Bible Broadcasting Network, Inc. FCC 92-307 released July 22, 1992 (para. 9), Deas' cannot resurrect the Bureau's argument. Even so, as the Board correctly notes, if the Commission carefully scrutinizes the "Hard Look" Order,[2] it will note that HBI's de minimis error under Section 73.316(b) of the Commission's rules does not render its application or its amendment either untenderable or unacceptable for filing. Rather, the Hard Look Order gives only full and explicit notice that a failure to meet Section 73.316(d) of the Commission's rules will require the drastic sanction of dismissal. In that regard, HBI met the Section 73.316(d) guidelines and even under "industrial strength" hard look scrutiny HBI's correction of a .02 calculation error was both allowable, if not required by Hard Look. Board Order at paras. 12-17.[3] Thus, the Bureau's admonition in the HDO that HBI's post designation amendment and its application could be dismissed if not acceptable for filing has no bearing on a de minimis .02 relative field value error which rendered the amendment neither untenderable nor unacceptable for filing. Hard Look

[2] 58 RR 2d 166, 168 (1985)

[3] Indeed, the Board wisely opines that Hard Look may be inapplicable to this case in any event given that the underlying error was not before the Bureau in the processing line. Board Order at fn. 20.

Order, supra at 168.[4] Rather, all of the elements of engineering data required for acceptability are correctly contained in the June 19, 1992 HBI amendment, e.g. HAAT, actual antenna location, maximum ERP, geographic location of site, antenna type and manufacture, among other things. Hard Look Order, supra.

Deas' tired arguments that somehow Pueblo Radio Broadcasting Service, 5 FCC Rcd 6278 (1991), requires reversal of the Board is truly misplaced. This argument grossly overlooks that there is a quantum leap between compliance with an international treaty and making a .02 field value error at one antenna pattern degree bearing based on a third party typographical error which four sets of engineers were unable to find and which did not go to the issue of acceptability or tenderability. Board Order at para. 14.[5] Contrary to the short shrift -- if not failure to recite all the facts -- both Deas and the Bureau gave Magdalene Gunden Partnership,[6] HBI's circumstances and reasons for acceptance of its corrected amendment are even more compelling than those endorsed there. In Gunden, the Board held that good cause existed for the acceptance of an amendment after issuance of a designation order in a comparative hearing and after the specification of a city grade coverage issue against an applicant, North Bay, concluding that North Bay's actions to correct its major problem within seven weeks were prompt and duly diligent because the time for calculating diligence commenced on the date of notice of the problem -- in Gunden, the date of specification of a transmitter issue by the presiding judge. 63 RR2d at paras. 8-9. The Board also held that even though North Bay's engineer did not follow either his own normal or good engineering practices concerning North Bay's original site (the cause of North Bay's problem), North Bay was entitled to and did rely upon their engineer's recommendation on a highly technical matter. Thus, it would be unfair to

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[4] Deas' attempt to characterize the HDO rendered under delegated authority by the Bureau as an unreviewable Commission Order is disingenuous. Longstanding Commission precedent authorized both the ALJ and the Review Board to make a reasoned analysis on the merits of any particular matter contained in the HDO. Atlantic Broadcasting Company, 5 FCC 2d 717, 8 RR 2d 991, 996 (1966). Thus, the Board reviewed the specific matter of the de minimis .02 field value error and noted that HBI was entitled to full and explicit notice that such an error would result in dismissal, which notice it had not been given. Salzer v. FCC, supra.

[5] Moreover, this argument fails to note the Bureau's record of not automatically dismissing applications which contain technical errors, rather inviting curative amendments thereto and the irrationality of the Bureau argument as refuted by these cases, that all engineering errors are foreseeable. See Board Order at paras. 13 and 16.

[6] recon. denied 3 FCC Rcd 488; rev. denied on other grounds, 3 FCC Rcd 7186 (1988) pet. for recon. denied, 5 FCC Rcd 2509 (1990) aff'd in part and reversed and remanded in part 69 RR2d 613, 615-616, sub nom Marin TV Services Partners, Ltd. v. FCC (D.C. Cir. 1991).

saddle an applicant with the failure of its professional engineer with regard to "an issue of a highly technical and esoteric error," which when corrected, provided the required city grade coverage. Id. at paras. 6-9.[7]

HBI's facts are much less egregious than North Bay's. Here, as the Board recognized, the technical error is much more esoteric, yet much less significant than city grade coverage, a sine qua non of both acceptance and grant of an application. Moreover, unlike Gunden, the error originates not with its expert consulting engineer but even one step further removed with typographical errors from the antenna manufacturer, itself. As the Board correctly notes four sets of engineers including those of Deas and the Bureau could not find this tiny latent error. Moreover, the typographical errors, when corrected, permit the correct calculated values so that HBI is in compliance with the requirements of Section 73.316(b)(2) of the Commission's rules, but for an outside third party's minor errors. Gunden, supra.

Deas' further footnote-buried arguments that other recent Commission precedent[8] requires reversal of the Board are as meritless as its claims that HBI's reinstatement disrupts the orderliness of this proceeding.[9] Both Crystal and LRB concern voluntary failures by applicants to conform to, the Commission's rules requiring timely filing of Notices of Appearance and related discovery documents with a specific admonition by the Commission, not the Bureau, that the failure to timely file these documents "may constitute a failure to prosecute" the application. Crystal Clear at para. 3. In contrast, HBI has complied with the hearing procedures in this proceeding, timely serving its Notice of Appearance and discovery documents and, but for its improvident dismissal, had offered and was prepared to take depositions in compliance with the Commission's rules and the presiding judge's discovery cut-off date.[10] Indeed, in response to the directions of the presiding judge that its direct case exhibits be served on all parties to the proceeding within one week of the release of the Board's Order, HBI is serving its direct written case

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[7] The D.C. Circuit, in turn, affirmed both the Board and later the Commission, stating that the expert could not have foreseen the technical issues and the necessity to amend its application and that North Bay was entitled to rely on its expert. Marin TV Services Partners, Ltd. v. FCC, supra.

[8] Crystal Clear Communications, Inc. FCC 92R-79, LRB Broadcasting FCC 92R-78 both released October 7, 1992.

[9] Indeed, the hypocrisy of this procedural claim should be juxtaposed with the instant unauthorized Deas pleading.

[10] It should be noted that HBI filed a request for reinstatement of its deposition with the presiding judge on October 22, 1992.

concurrent herewith.[11] Moreover, those hearing exhibits show that the parties have stipulated that all of the areas which each of the parties propose already receive five or more aural services. See Engineering Stipulation dated October 26, 1992, submitted to the presiding judge October 29, 1992. Clearly, argument over a de minimis calculation error of .02 around the 190 degree azimuth bearing has no bearing on the engineering issue in this proceeding. Just as clearly, this proceeding has not been delayed to anyone's prejudice, but HBI's and, meanwhile, the proceeding is going forward.

Finally, contrary to Deas' claims, HBI made a full good cause showing in both its Show Cause Response and Petition For Leave To File Corrected Amendment devoting much of its discussion to the lack of foreseeability of the esoteric engineering error, which was not the product of a voluntary act as the Board affirmed and as Marin TV Services directed. Board Order at paras. 16-18. Thus, in all respects, HBI met the good cause tests of the Commission's rules.

Conclusion

For all of the foregoing reasons, the Deas "Application For Review" should be dismissed and denied.

Respectfully submitted,

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October 27, 1992

[11] Moreover, Crosthwait v. FCC, 584 F.2d 550, 555 (D.C. Cir. 1978) holds that opponents have no "vested interest" in disqualification of their adversaries. Board Order at fn. 17.

CERTIFICATE OF SERVICE

I, Peter A. Casciato, certify that the following is true and correct:

I am employed in the City and County of San Francisco, California, am over the age of eighteen years, and am not a party to the within entitled action:

My business address is: 1500 Sansome St., Suite 201, San Francisco, California 94111.

On October 27, 1992, I caused the attached Healdsburg Broadcasting, Inc. Opposition of to Application For Review Or, Alternatively Motion For Extraordinary Relief to be served by causing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, to be placed in the United States Post Office mail box at San Francisco, California, addressed to the following listed people:

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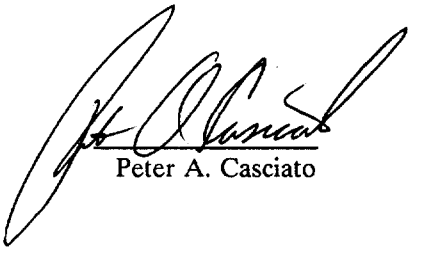

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